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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. **3**

THE SCHRIBER-SCHROTH COMPANY, Petitioner,
vs.

**THE CLEVELAND TRUST COMPANY, CHRYSLER
CORPORATION, Respondents.**

No. **4**

THE ABERDEEN MOTOR SUPPLY COMPANY, Petitioner,
vs.

**THE CLEVELAND TRUST COMPANY, CHRYSLER
CORPORATION, Respondents.**

No. **5**

THE F. E. ROWE SALES COMPANY, Petitioner,
vs.

**THE CLEVELAND TRUST COMPANY, CHRYSLER
CORPORATION, Respondents.**

**REPLY BRIEF OF PETITIONERS ON PETITION
FOR WRIT OF CERTIORARI.**

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 674.

THE SCHRIER-SCHROTH COMPANY, Petitioner,

vs.

**THE CLEVELAND TRUST COMPANY, CHRYSLER
CORPORATION, Respondents.**

No. 675.

THE ABERDEEN MOTOR SUPPLY COMPANY, Petitioner,

vs.

**THE CLEVELAND TRUST COMPANY, CHRYSLER
CORPORATION, Respondents.**

No. 676.

THE F. E. ROWE SALES COMPANY, Petitioner,

vs.

**THE CLEVELAND TRUST COMPANY, CHRYSLER
CORPORATION, Respondents.**

REPLY BRIEF OF PETITIONERS ON PETITION FOR WRIT OF CERTIORARI.

In order to point out that this is not "an ordinary patent case," as said by Respondent, but, on the contrary, that

these cases are of great legal and public importance, we make this brief reply.

(1) It is not disputed that the Circuit Court of Appeals held **web flexibility** to be the *sine qua non* of the Gulick and Maynard patents.

Respondent says **web flexibility** is common knowledge. Today, yes. When the Gulick application was filed, no. If **web flexibility** had been known when Gulick filed, there is no plausible explanation of how Gulick came to describe his webs (the only "connection between the piston pin bosses and the skirt") originally as follows (Rec. p. 1839, Resp. Br. p. 18):

"* * * the above described construction also provides an **extremely rigid connection** between the piston pin bosses and the skirt of the piston" * * * (emphasis supplied).

It was not until after the flexible web type piston became the popular market piston, through the efforts of Long and others, that "web flexibility" was grafted on Gulick's application by the artifice of amendment, five years* after filing, as follows (Rec. pp. 1869, 1867):

*Nearly six years after the production of such a piston by Long, a competitor, nearly five years after such Long pistons appeared on the market, over two years after adoption of such Long pistons by Franklin Automobile Company, over two years after the published description of such a Long piston by an engineer of Packard Motor Company, over a year after the advertisement of such a Long piston by Long's licensee (Findings of Fact 27, Rec. p. 1863), and after Gulick's assignee, Packard Motor Company, obtained knowledge of an interference proceeding (Rec. p. 1875) between two other applications pending in the Patent Office involving a claim directed to such a piston construction.

"the above described construction also provides an *a longitudinally*

extremely / rigid connection between the piston pin
guide portion

bosses and the skirt / of the piston, which construction may be used either with or without the split
guide portion

skirt / and separated head. The arrangement of the supporting flanges 17 between the ends of the piston pin
both

bosses and the connections of those flanges with / the piston skirt provide a particularly strong support for the bosses- construction, and at the same time when the longitudinal split is used, as shown, the web structure has sufficient lateral flexibility to permit the split to close more or less under the action of the expansion forces incident to the heating of the piston." (Added matter in italics; original text in regular type; cancellations lined.)

Then and there was the first hint of web flexibility injected into the application. Then and there, the web, which, *for five years*, had been *extremely rigid* was changed to "longitudinally rigid—laterally flexible." That the two are incompatible, see testimony of Respondent's expert, Record pages 149-150:

"Q. But reading it without that careful word 'longitudinally' when it states 'also provides an extremely rigid connection between the piston pin bosses and the skirt of the piston,' one would naturally assume that the 'extremely rigid connection between the piston pin bosses and the skirt of the piston,' is this web connection right here about at 16, Fig. 1; isn't that right?

A. It would have to be in the connection between the

bores portion and the skirt portion. But then so far as rigidity is concerned that is, of course, incompatible with flexibility. He does have a rigid piston longitudinally, a flexible piston laterally." (Emphasis supplied.)

The above testimony of Respondent's expert witness completely refutes the argument in Respondent's brief (pp. 18 and 19) that "rigid connection" referred to in the Gulick original application meant vertical rigidity and lateral flexibility.

Respondent says that the drawings of the Gulick application showed the skilled in the art that there was web flexibility, and that the amendments were made to teach the unskilled* (Brief p. 18). It is immaterial that the experts "looking at the drawings" (Resp. Brief p. 3) alone, thought the structure shown would be flexible, because both agreed that the written words "extremely rigid" completely negated any possibility of it.** If, as this Court held in *Permutit v. Graver*, 284 U. S. 52, drawings alone, in the absence of description, cannot repair a defect in disclosure, *a fortiori*, must the law be so when the written description is directly contrary.

The pretense (Resp. Br. pp. 11-13) that "flexibility" was injected to describe a known property of an element rather

*This is a plain misstatement. It is familiar law that the patent specifications are addressed, not to the unskilled, but to the skilled in the art. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 1 c. 437.

"The specification of the patent is not addressed to lawyers, or even to the public generally."

**Patenters' witness Stallman, Rec. p. 438:

"A. He describes a very rigid section between the wrist pin houses and the skirt of the piston, designated by 17 and 18 in Fig. 4.

Q. Would that convey to your mind that the structure was intended to be very flexible?

A. No, sir; I should say that he intended that it should be rigid."

than to describe essential structure and principle of operation (description of which is required by R. S. 4868, 35 U. S. Code 33) shows the desperation of Respondent to excuse its conduct. A "property" is an inherent thing, and that more than inherent flexibility is required, there can be no doubt from the testimony of Respondents' expert witness:

"Q. You cannot rely upon the inherent flexibility of any given structure, then, to produce that result, can you? A. No. I think not" (Rec. p. 229*).

The question presented is whether the ruling of the Circuit Court of Appeals for the Sixth Circuit (that "web flexibility" was not only properly a part of the Gulick disclosure, but that "web flexibility" was an essential element of the piston) is compatible with *Permutit v. Graver*, 284 U. S. 52, and *Powers Kennedy C. & M. Co. v. Concrete Mixing Co.*, 282 U. S. 175, as this Court intended that those decisions be interpreted and applied.

The fact that Respondent, in an effort to support the decision of the Circuit Court of Appeals, has gone to the extreme of contending that it is the drawing, and the drawing alone, of the Gulick patent which makes the disclosure, and that the original specification should be ig-

*See also Rec. p. 229:

"Q. In other words, there must be a deliberate design of the web to produce flexibility?

A. I don't know that there must be deliberate design to produce flexibility, if the design is capable of doing that, but there certainly must be a correct proportioning of the different parts as to location and thickness in order to produce the desired result."

Rec. p. 184:

"Q. You wouldn't say, then, that the inherent flexibility of any structure having cross webs is then sufficient to permit a skirt to contract circumferentially in order to compensate for expansion?

A. No, I would not. This contraction is not a circumferential contraction in the sense that the entire circumference is contracted. It is a reduction of diameter by the closing of this slot, by the general cantilever principle."

nored in so far as it is inconsistent with what is now claimed for the drawing, shows, upon its face, that the Circuit Court of Appeals misinterpreted the cases of *Permutit v. Graver, supra*, and *Powers-Kennedy C. & M. Co. v. Concrete Mixing Co., supra*.

(2) Respondent seeks to negative our suggestion of public importance by setting itself up as a benefactor enabling "individual inventors" to "realize remedies which the public intended they should have." Of the eighty patents held in Respondents' pool, the only individual-inventor-beneficiaries are L. P. Mooers (apparently the promoter of the scheme) and H. J. Häter (whose fifty shares were originally issued to his company, *Rec. p. 1409*). Whether for or against public policy, the scheme is one to enable the pool to claim success and importance for any chosen patent during its life, but thereafter to denounce it as no-good; to say of any chosen patent that it, and not the other seventy-nine, is the reason why royalties are paid to the pool; and to say to manufacturers that while the record shows you pay a penny a piston, you get most of this back, and the pool gets the opportunity of claiming commercial success.

Respondents' brief (pp. 22 and 23) raises the additional question whether, by the adoption of Equity Rule 61½, this Court mitigated the standing which, in *Adamsen v. Gilliland*, 243 U. S. 350, it had accorded the report of a Master who saw and heard the witnesses. Respondent says, in effect, that the Court of Appeals for the Sixth Circuit has never treated such a Master's Report "as unassailable" (*Adamsen v. Gilliland, supra*), but, on the contrary, has regarded it as merely "presumptively correct" (Equity Rule 61½).

Respondents' admission (Br. pp. 45) that the Department of Justice is now investigating its "repository of patents," as well as the Aluminum Company of America, is a concession that Respondent has manipulated its "repository of patents" to the injury of the public, and is an admission of the public importance of these cases.

(3) It is not denied that Respondent can get practically complete nation-wide enforcement of its patents without going outside the Sixth Circuit. Respondent says that while the automobile manufacturers are in the Sixth Circuit, some of the piston manufacturers are not. The automobile manufacturers are users and sellers, hence as subject to suit as these Petitioners, and one of them (Chrysler) has already been sued (in the Sixth Circuit). Respondent could, of course, go outside the Sixth Circuit to sue piston makers, but we say it has not and it need not. In fact, the maker of the piston accused here invited (Rec. p. 22) Respondent to bring suit against it in its home jurisdiction, the Eighth Circuit, but Respondent would sue only its customers, until finally that maker sued Respondent for an injunction to restrain unfair trade practice, and Respondent counterclaimed (in the Sixth Circuit) for patent infringement.

We submit that the legal and public importance of these cases is sufficient to justify the granting of the writs, and it is prayed that the writs be granted.

Respectfully submitted,

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